Supreme Court, U.S.
FILED
SEP 23 1996
CLERK

(3)

No. 96-233

In The

Supreme Court of the United States

October Term, 1995

DEAN PATRICK J. ROHAN,

Petitioner,

-against-

THE AMERICAN BAR ASSOCIATION, CLAUDE R. SOWLE, JAMES P. WHITE, R. WILLIAM IDE III, BARBARA B. LEWIS, PHILIP D. SHELTON, GEORGE S. GROSSMAN, and BRADLEY J.B. TOBEN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF

PHILIP A. BYLER, Esq.
Counsel of Record and
Attorney for Petitoner
Dean Patrick J. Rohan
745 Fifth Avenue - 29th Floor
New York, New York 10151
(212) 980-8500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 PP

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. The Respondents Misstate The Case 1

1. The Complaint 1

2. The ABA's Procedures and Power 1

3. Dean Rohan's Deanship 4

4. The Events of 1990 and 1991 4

II. The Respondents' Purported Reasons For Denying The Petition For A Writ Of Certiorari Cannot Withstand Scrutiny 4

1. Conflict and Error 4

(a) "Nexus" 5

(b) Property 6

(c) Liberty 7

2. The Basis of the Petition 7

3. Mistreatment Of State Law Issues 8

4. The Abuse Of Summary Judgment And Lack Of Judicial Independence 9

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Board of Regents v. Roth, 408 U.S. 564 (1972) 6, 7

Chernin v. Lyng, 874 F.2d 501 (8th Cir. 1989) 7

Connell v. Higginbotham, 403 U.S. 207 (1971) 6

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 5

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring) 7

McLaurin v. Fischer, 768 F.2d 98 (6th Cir. 1985) 7

New York Times v. Sullivan, 376 U.S. 254 (1964) 7

Paul v. Davis, 424 U.S. 693 (1973) 7

Perry v. Sinderman, 408 U.S. 593 (1972) 6

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 5

Siegert v. Gilley, 500 U.S. 226 (1991) 7

Tarkanian v. NCAA, 488 U.S. 179 (1988) 5

CONSTITUTIONS, STATUTES AND RULES

American Bar Association Policies of the Council of the Section of Legal Education and Admissions to the Bar and of the Accreditation Committee 1

American Bar Association Rules of Procedure for Approval of Law Schools 1

Title 42, § 1983 ..... *passim*

United States Constitution, Fourteenth Amendment ..... *passim*

TREATISES

N.Y. Jur. 2d, *Attorneys at Law* § 2 2

INTRODUCTION

Respondents' misfocused brief in opposition, when critically examined, only shows that *there is no answer to the Petition* and thus reaffirms the need for this Court to issue a writ of certiorari in this case, so that this Court can address constitutional questions important to the rule of law and to legal education concerning the due process accountability of the respondent American Bar Association ("ABA") in the inspection and approval of law schools for Bar admissions and so that this Court can correct the failure of judicial independence so lamentably manifest here.

ARGUMENT

Respondents' brief in opposition is flawed in two fundamental respects: (I) it misstates the case; and (II) it states purported reasons for denying certiorari which cannot withstand scrutiny.

I. The Respondents Misstate The Case.

Respondents' brief in opposition is not an accurate source for a statement of the case.

1. *The Complaint.* Respondents' brief does not fully describe the Complaint, omitting the due process problem of biased fact-finding and omitting identification of the specific ABA Rules of Procedure and Council Policies violated in this case. The Petition at pages 13 and 14 gives a far more precise description, and portions of the Complaint are quoted in the Petition Appendix (Pet. App. 33-41). The Complaint terms as "unjustified" the statements that ultimately led to the ABA's treatment of Dean Rohan as "adversely mentioned" in the ABA 1990 inspection of St. John's Law School.

2. *The ABA's Procedures and Power.* Respondents' brief amazingly omits any recognition of the ABA's Rules of Procedure and Council Policies (*see* Petition, pp. 2-3). Respondents' brief also is grossly misleading concerning the ABA's power over the approval of legal education for attorney licensing purposes. The record shows the ABA has such

control and compels a finding of delegated state authority to the ABA – as recognized by Judge Bellacosa and the ABA Accreditation Committee (*see* Petition, pp. 16-17).

In the United States, each State or other admitting jurisdiction maintains requirements that an individual must meet in order to be licensed as an attorney-at-law. (A 132, 1137-99.)[1] *See* New York Jur. 2d, *Attorneys At Law* § 2 (an attorney "is an officer of the court"). The state judiciaries are responsible for setting requirements, and a critical requirement is a legal education. (A 132, 1048.) A legal education and degree from an ABA-accredited law school is recognized in every State (A 1137-99, 1212-13); and to quote the ABA in its own court brief: "Most jurisdictions limit bar admissions to graduates of ABA approved law schools, by supreme court rules, by statute, or by policy of the Board of Law Examiners." (A 1103; *see also* A 1230.) Forty-five States limit Bar admissions to graduates of an ABA approved law school, either by Supreme Court rule, statute or policy of the Board of State Bar Examiners. (A 1116-17.) In other jurisdictions, the nearly exclusive means (and sometimes the only effectively available means) by which individuals are permitted to take the Bar examination and thus to be admitted to those Bars is to graduate from an ABA approved law school. (A 132.) In New York State, a degree from an ABA-accredited law school is effectively required. (A 132-36.) In addition, the United States Department of Education recognizes the ABA as the sole national accrediting agency for professional schools of law. (A 136, 209, 1200-02, 1206, 1231.) This is important because "[w]hile admissions to the bar are within the jurisdiction of the highest court of each state, in recent years the accreditation of law school has come within . . . the Department of Education, in order to furnish the statutory basis for approval of federal funds for educational purposes." (A 1231; *see* 1202.)

There is no review of ABA decisions on inspection and accreditation of law schools by the admitting jurisdictions or

---

[1] Citation to the record in the Second Circuit will be to "A___".

by the U.S. Department of Education; the ABA does *not* merely recommend and the state judiciaries (most particularly here, New York) accept after review; rather, the ABA decides and the state judiciaries (including New York's) rely. For example, there has never been an instance of the ABA refusing to approve a law school and New York approving it, and there has never been an instance of the ABA approving a law school and New York rejecting it. (A 132-35, 137-38.) As a general matter, when the state judiciaries and state boards of law examiners require a degree from an ABA-accredited school, and a school is not approved by the ABA, graduates of that school simply do not satisfy the requirement. When persons attempt to gain admission to practice without satisfaction of that requirement, the state judiciaries and boards of examiners defend their requirement, and the ABA enters as *amicus curiae* to oppose the application. (A 132, 1083-1136.)

As a result, the ABA has effective power in the exercise of its "quasi-judicial" authority to compel "voluntary" cooperation from law schools and affected individuals. (A 137, 1029, 1043.) As Dean Rohan explains, "This power is power to decide whether a law school shall live or die, for without ABA accreditation a law school cannot warrant that its law school graduates will be eligible to be admitted to the Bar." (Pet. App. 44.) Dean Rohan further testified:

> "By virtue of the ABA's unreviewed power to grant, withhold, continue or discontinue accreditation – a power delegated to it [in New York] by the New York Court of Appeals – the ABA wields effective authority to obtain 'voluntary' cooperation from inspected law schools and affected individuals, without the need for any subpoena or sanctions power. As a Law School Dean, and as a member of the [ABA] 'site evaluation team' for Seton Hall Law School, I was very much aware that the ABA was clothed with delegated state power. What happened at St. John's University in 1990 is a good example of its force – a demonstration of the fact that even rumors of trouble with the ABA can rock a school down to its foundation." (Pet. App. 52.)

3. *Dean Rohan's Deanship.* Respondents' brief is not a source at all on Dean Rohan and his Deanship. On those subjects, respondents say nothing. The Petition at pages v to vii reviews Dean Rohan's distinguished service to and professional achievements in legal scholarship, legal education, the legal profession, government and society. The Petition at pages 3 to 4 reviews Dean Rohan's accomplishments as Dean of the St. John's Law School in such matters as curriculum, minority opportunities, student-professor ratio, and building facilities; indeed, the 1990 poll of students at St. John's Law School showed the vast majority of students as satisfied with the quality of their legal education and the Law School administration.

4. *The Events of 1990 and 1991.* Respondents' brief does not provide an appropriate statement of the record facts concerning the 1990 ABA site inspection at St. John's Law School, the removal of Dean Rohan as Dean as a foreseeable consequence of the 1990 ABA site inspection of St. John's Law School, the ABA site inspection team report (which caused the ABA to treat Dean Rohan as a person "adversely mentioned"), the ABA Accreditation Committee action, the subsequent appointment of an ABA Accreditation Committee member to the Deanship at St. John's in 1991, the ABA's failure to preserve confidentiality under the ABA's Rules and Policies, and Dean Rohan's damages. Those facts are more appropriately stated in the Petition at pages 4 to 11. The respondents' superficial and incomplete counter-statement simply cannot be considered acceptable in the procedural posture of summary judgment.

II. The Respondents' Purported Reasons For Denying The Petition For A Writ Of Certiorari Cannot Withstand Scrutiny.

The purported reasons in respondents' brief for denying the Petition for a writ of certiorari cannot withstand scrutiny.

1. *Conflict and Error.* Respondents are badly misfocused in arguing that the Second Circuit's not-for-publication, not-for-citation summary order does not conflict with

decisions of this Court or any Court of Appeals and is correct. What the Petition shows is: that an important question of constitutional law – the ABA's delegated state authority in the inspection and approval of law schools for attorney licensing purposes – has not been and needs to be decided, finding state action (pp. 15-19); that the Second Circuit's decision, which purported to avoid the broader state action issue, was contrary to state action and summary judgment law (pp. 19-24); and that the Second Circuit's mistreatment of Dean Rohan's "property" and "liberty" interests was premised on misstatements of Dean Rohan's case and thus reached a result contrary to governing law (pp. 24-27).

(a) *"Nexus."* Respondents' brief inexcusably resorts to fiction when arguing that the Second Circuit correctly stated and applied the law in holding that there was no "nexus" between Dean Rohan's employment-related and reputational injuries and the ABA's state power over law school approval for Bar admissions. The Second Circuit did *not* state any general proposition of law on "nexus." The Second Circuit did *not* cite cases such as *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *Tarkanian v. NCAA*, 488 U.S. 179 (1988), involving the "nexus" language relied upon by the ABA. As shown in the Petition at page 20 and as had been shown to the Second Circuit in the briefing, those decisions could not be applied here because they presupposed that the defendant institution was *not* engaged in state action – unlike the Second Circuit's assumption in this case; and the same point would apply as well to *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (privately owned utility not a state actor).

What the Second Circuit did – without the citation of any case law and in a not-for-publication, not-for-citation summary order – was simply to assert that the ABA respondents could not arguably be considered state actors unless they made comments to the St. John's University administration at the site inspection team's exit interview expressly linking Dean Rohan's removal from the Deanship to successful accreditation of the law school and that Dean Rohan did not establish a triable issue that this occurred. As shown in the

Petition (pp. 19-24), neither proposition could be maintained. The Second Circuit did *not* cite any legal authority at all on this subject, for the simple reason that on the law, the Second Circuit's ruling was not supportable; and the Second Circuit's treatment of the record was not justifiable under established principles of summary judgment law. As much as the ABA would like – irresponsibly – to disassociate itself from Dean Rohan's loss of the Law School Deanship at St. John's University and suffering of what the courts call "stigma-plus," the ABA's state inspection activities were shown in the record below to be the proximate cause of those deprivations. In an attempt to avoid that proper conclusion, the Second Circuit resorted to calling "speculation" what was instead proper testimony and proper inferences required by the rules governing summary judgment to be drawn in favor of Dean Rohan based on all the materials in the summary judgment record. (Petition, pp. 21-24). Such an unprincipled decision should not be allowed to stand.

(b) *Property.* Respondents defend the Second Circuit's ruling on Dean Rohan's property interest in his Deanship – which was *not* an "at will" position – by: (i) ignoring the record reviewed in the Petition at page 25; (ii) ignoring the proper application of New York law discussed in the Petition at pages 25 and 26; and (iii) misanalyzing the relationship between federal and state law on the definition of property (and misdescribing Dean Rohan's position on the point). The question of what constitutes "property" within the meaning of the Fourteenth Amendment to the U.S. Constitution is by definition a question of federal constitutional law; it is in defining what is such "property" that reference needs to be made to "an independent source such as state law" for the purpose of establishing whether there is "a legitimate claim of entitlement." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Here, in misapplying New York at will employment law in order to deny a federal constitutionally protected property interest in Dean Rohan's Deanship (the facts concerning which are in the record), the Second Circuit's not-for-publication, not-for-citation summary order was in conflict with: *Connell v. Higginbotham,* 403 U.S. 207 (1971); *Perry v.*

Sinderman, 408 U.S. 593 (1972); *Chernin v. Lyng,* 874 F.2d 501 (8th Cir. 1989); *McLaurin v. Fischer,* 768 F.2d 98 (6th Cir. 1985); and the federal constitutional purpose in recognizing property rights, as stated in *Roth.* (*See* Petition, p. 26.) Manipulation of state law categories cannot control substantive constitutional protection. *New York Times v. Sullivan,* 376 U.S. 254 (1964).

(c) *Liberty.* Respondents' brief repeats the error of the Second Circuit in mistreating Dean Rohan's liberty interest as lost employment flowing from defamation. As shown in the Petition (p. 27), the Second Circuit's error stems from its misstatement of Dean Rohan's denial of due process case as one of mere disparagement. Again, what Dean Rohan has quite differently asserted – consistent with *Roth, Paul v. Davis,* 424 U.S. 693 (1973), and *Siegert v. Gilley,* 500 U.S. 226 (1991) – is that he: (i) was removed from the St. John's Deanship and lost income as a result of the ABA site inspection's lack of due process; (ii) suffered reputational injury in the public when removed from that Deanship in the wake of the flawed ABA site inspection (and later when the *New York Times* reported on the matter based on breached ABA confidentiality rules); (iii) lost a directorship and a visiting professorship; and (iv) did not, as he had in the past, receive any fee-generating appointments. The foregoing is "stigma-plus" under *Roth* and also the kind of "grievous loss" that Justice Frankfurter stated could not be inflicted without due process, *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. at 123, 149, 168 (1951); and important due process precedents such as *Joint Anti-Fascist Refugee Committee* preclude the erroneous application of *Paul v. Davis* and *Siegert v. Gilley* urged here by the ABA. Once Dean Rohan's "liberty" interest is properly stated, the respondents' brief is unsupportable.

2. *The Basis of the Petition.* The Respondents' brief is wildly inaccurate in asserting that the Petition largely rests on mere disagreements with the factual determinations of the lower courts. The lower courts did mistreat the factual record in a way that mocked the law governing summary judgment, but the Petition is premised on the need for this Court: (i) to address important questions of constitutional law (so that the

ABA does not wield power without due process accountability in the inspection and approval of law schools for Bar admissions) and (ii) to exercise its supervisory authority as a result of the failure of judicial independence favoring the ABA (which publicly extols its role in the selection of federal judges).

Review of this case cannot sensibly be denied, as the respondents would have it, on the basis of respondents' wholly erroneous claim that undisputed evidence demonstrates the lack of proximate causation. To the contrary, the record evidence shows that ABA denials of due process in the inspection of St. John's Law School, leading up to the ABA site team's oral report at the exist interview with the St. John's University administration and respondent White's communications with the St. John's University President, did proximately cause Dean Rohan's removal from the Deanship (*see* Petition, pp. 6-8, 21-24). While the formal ABA site inspection report was issued subsequent to Dean Rohan's removal, Dean Rohan's responses to that report contemporaneously documented the ABA's denials of due process, and the subsequent leakage by ABA representatives to the *New York Times* of the ABA report – in violation of the ABA's Rules of Procedure and Council Policies on preservation of confidentiality – contributed to Dean Rohan's suffering of "stigma-plus" (*see* Petition, pp. 8-11).

3. *Mistreatment Of State Law Issues.* The respondents' brief is also wrong in asserting that the Petition seeks review of a number of questions of state law. The point of the Petition was different and cannot be so easily dismissed. The Petition discussed what was an entirely illogical and unsupportable dismissal of the state law claims as a further demonstration of the failure of judicial independence in this case (*see* Petition, p. 28). The Second Circuit did not reach the very points in the District Court's opinion that the District Court relied upon in dismissing Dean Rohan's state constitutional and common law due process claims, yet at the same time the Second Circuit "ruled" that it relied on the District Court's opinion for the dismissal of the state law claims. No one should be fooled; the Second Circuit was papering over

giving the ABA what the ABA wanted: avoidance of Dean Rohan's rightful day in court on the ABA's due process violations.

4. *The Abuse Of Summary Judgment And Lack Of Judicial Independence.* Respondents' cursory attempt to dismiss the abuse of the summary judgment mechanism and lack of judicial independence in this case must be considered entirely unsatisfactory. The ABA respondents cannot and do not deal with the Petition's critique of the actions of the lower courts in this case. All that the ABA respondents do is to label these problems as illogical. Unfortunately, with ABA influence over the selection of the federal judiciary, the logic is all too clear. What is truly illogical are the two arguments that respondents use to belittle the problems of the abuse of the summary judgment mechanism and lack of judicial independence in this case. *First*, respondents assert that the Second Circuit's use of the not-for-publication, not-for-citation summary order was in accordance with the Second Circuit's practice; however, as shown in the Petition (pp. 29-30), the not-for-publication, not-for-citation summary order in this case cannot be justified under Second Circuit Chief Judge Newman's own criteria: in a case briefed as presenting a constitutional question of first impression at the federal appellate level, the Second Circuit, *inter alia*, cited no case precedent supporting its mistreatment of the state action issue. *Second*, respondents defend the Second Circuit's decision not to reach to the broader constitutional issue of the ABA's state delegated authority; however, as also shown in the Petition (pp. 19-24), the Second Circuit's justification for not reaching the broader state action issue was entirely erroneous, lacking supporting case precedent and involving a slick mistreatment of record evidence to reach a result for the politically influential ABA.

CONCLUSION

For the reasons stated in the Petition and above, this Court should grant the Petition and issue a writ of certiorari to review and reverse the decision and judgment of the United

States Court of Appeals for the Second Circuit. Our country's commitment to the rule of law dictates that the ABA be required to provide due process of law in its delegated authority from state judiciaries to inspect and approve law schools for licensing of attorneys (*i.e.*, "officers of the court") and that Dean Rohan be allowed to maintain his suit to enforce that due process obligation.

Dated: New York, New York
September 20, 1996

Respectfully submitted,

PHILIP A. BYLER, ESQ.
Counsel of Record and
Attorney for Petitioner
Dr. Patrick J. Rohan
745 Fifth Avenue – 29th Floor
New York, New York 10151
(212) 980-8500